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In the
Supreme Court of the United States

OCTOBER TERM 1961

No. 208

GENERAL DRIVERS ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION NO. 498, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, C. B. BUTLER, INDIVIDUALLY, AND AS PRESIDENT OF SAID LOCAL NO. 498, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*,

v.

FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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GENERAL DRIVERS ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION NO. 498, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, C. B. BUTLER, INDIVIDUALLY, AND AS PRESIDENT OF SAID LOCAL NO. 498, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners,*

v.

FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

General Drivers Allied Automotive and Petroleum Local Union No. 498, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C. B. Butler, Individually, and as President of said Local No. 498, and The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein collectively called the Union, pray that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Kansas, entered in the above-entitled case on March 17, 1961. In this opinion that court construed the Kansas "right to work" constitutional amendment to proscribe the making of so-called agency shop agreements,

and held that the National Labor Relations Act did not supersede or preempt state legislation in this area but, on the contrary, Section 14 (b) of that Act affirmatively granted the states authority to so legislate. The court declared the agency shop agreement to which petitioners were a party to be invalid under the Kansas law.

OPINION BELOW

The Opinion and Judgment of the Supreme Court of Kansas is officially reported as 188 Kansas Reports 11 (1961) and is attached hereto as Appendix A. See also R. 17-40.

JURISDICTION

The decree of the Supreme Court of Kansas was entered on March 17, 1961 and a petition for rehearing was denied by that court on April 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. The Supreme Court of Kansas has construed the "right to work" amendment to the State Constitution to prohibit, in industries affecting commerce, the making of "agency shop" agreements under which non-union employees covered by a collective agreement are required, as a condition of employment but with no obligation to become union members, to pay the union bargaining representative a servicing fee equivalent to union dues as their proportionate share of the costs of collective bargaining. The basic question in this case, then, is whether such State Constitutional amendment so construed is superseded or invalidated under the supremacy clause of the Federal Constitution by the provisions and operation of the National Labor Relations Act notwithstanding the provisions of Section 14 (b) of that Act authorizing the States to prohibit agreements requiring union membership as a condition of employment.

2. A related question is whether the National Labor Relations Board has exclusive jurisdiction to determine the legality of the agency shop clause under the National Labor Relations Act so as to oust state courts of that jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 151 *et seq.*, are Sections 7, 8(a) (1) and (3), 8(b) (1) (A), 8(b) (2) and 14(b):

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."
>
> "Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7,
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later: . . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable

grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

"Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Article 15, Section 12, of the Constitution of the State of Kansas, General Statutes 1959 Supplement:

"No person shall be denied the opportunity to obtain or retain employment because of membership or non-membership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or non-membership in any labor organization."

STATEMENT

A. The Facts

This case having arisen under the pleadings and a motion to dismiss, the facts are not in dispute and are as stated in such pleadings and as stated by the Supreme Court of Kansas in its decision. These facts are as follows:

Petitioner Local No. 498 is a local labor organization, located in Kansas City, Kansas, and is affiliated with the petitioner. International Brotherhood of Teamsters. On or about the 15th of November, 1958, the Cardinal Manufacturing Company, Inc., (manufacturers of television picture tubes), recognizing the union as the exclusive bargaining agency for all employees within the "bargaining unit", entered into an agreement with the Union for a one year term commencing November 15, 1958. The agreement provides in part as follows:

ARTICLE II

Employer-Union Relations

Section 1. The Employer recognizes the Union as the exclusive bargaining agency for all employees within the "bargaining unit" as heretofore certified by the National Labor Relations Board.

* * *

ARTICLE III

Section 1. Agency Shop (a) Membership in the Union is not compulsory. Employees have the right to join, not join, maintain or drop their membership in the Union, as they see fit. Neither party shall exert any pressure on or discriminate against an employee as regards such matters.

(b) Membership in the Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefits. The Union is required, under this Agreement, to represent all of the employees in the bargaining unit

fairly and equally without regard as to whether or not an employee is a member of the Union. The terms of this Agreement have been made for all employees in the bargaining unit and not only for members in the Union and this Agreement has been executed by the employer after it has satisfied itself as the result of a secret ballot that the Union is the choice of a majority of the employees in the bargaining unit and the Union has been certified by the National Labor Relations Board.

(c) In accordance with the policy set forth under sub-paragraph (a) and (b) of this Article, all employees shall, as a condition of continued employment, pay to the Union, the employees' exclusive collective bargaining representative, an amount of money equal to that paid by other employees in the bargaining unit who are members of the Union, which shall be limited to an amount of money equal in the Union's regular and usual initiation fees, and its regular and usual dues and its general and uniform assessments. For existing employees, such payments shall commence thirty (30) days following the date of execution of this Agreement and for new employees, the payments shall start sixty (60) days following the date of employment.

(d) The Union agrees to indemnify the Company and hold the Company harmless from any final determination of liability to any employee by reason of the discharge of such employee if such discharge was caused or effected by a request of the Union, as provided for in the preceding paragraphs of this contract.

The Company agrees to notify the Union of the pendency of any law suit which results from the discharge of an employee at the request of the Union within ten (10) days of the date of service of summons on the Company, and the Union obligates itself to defend the law suit.

Section 2. The Employer agrees to deduct from the pay of all employees covered by this Agreement who so authorize in writing, dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions. Where laws require

written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by the applicable law.

The respondents herein (plaintiffs below), Floyd Higgins, Oscar Waddell and Beulah Lamuel are all employees of Cardinal Manufacturing Company Inc. On or about February 10, 1959, each of the above respondents received a certified letter from the Local Union No. 498, advising them that if they did not pay a sum of Twelve ($12.00) dollars by March 1, 1959, that C. B. Butler, as president of said Local Union would request Cardinal Manufacturing Company, Inc., to discharge each of them. None of the plaintiffs were members of the Local Union No. 498.

These respondents then brought an action against the petitioners herein in the District Court of Wyandotte County, Kansas, as individuals and as representatives of such employees of Cardinal "who are not now members of said Local Union No. 498, or who may hereafter resign membership therein," alleging that Article III of the contract between Local Union No. 498 and Cardinal Manufacturing Company Inc., was in violation of the Kansas "Right to Work" Constitutional Amendment, and praying for injunctive relief and a declaratory judgment concerning the controversy. Their petition was filed on March 2, 1959. (R. 13).

B. The District Court's Opinion And Decree

The District Court of Wyandotte County, Kans., upon the filing of a petition setting forth the above facts (R. 13(2)), issued a temporary restraining order. Thereafter a motion to dismiss the action for injunction, and to dissolve the temporary restraining order, was filed by the union defendants challenging the jurisdiction of the state court on the ground that the state law was superseded by the National Labor Relations Act, and challenging the sufficiency of the petition to state a cause of action under the laws of the State of Kansas (R. 13(11)).

The District Court overruled the motion on the jurisdictional ground (R. 4) but sustained it on the ground the petition did not state a cause of action, the court holding that the agency shop provision was not within the scope of the Kansas "right to work amendment." Respondents appealed to the Supreme Court of Kansas and the petitioners herein cross-appealed to keep both jurisdictional questions open (R. 15(2)).

C. The Kansas Supreme Court's Opinion and Decree

The Supreme Court of Kansas reversed the action of the lower court in sustaining the motion to dismiss. That court held that the Kansas constitutional amendment, commonly known as the "right to work amendment", operated to proscribe the agency shop clause in the instant case, the state having such authority by virtue of the provisions of Section 14(b) of the Taft-Hartley Act, and the courts of Kansas have jurisdiction to process violations of such amendment. The state supreme court further held that the phrase "membership in a labor organization as a condition of employment" in Section 14(b) of the Taft-Hartley Act embraced the payment of a service fee to a union even though union membership was not required as a condition of employment. The court overruled the District Court, holding that the petition below did state a good cause of action for injunctive and declaratory relief and that the state court had jurisdiction to issue such injunction, and declaring the Kansas constitutional amendment to be valid and not superseded by the National Labor Relations Act, as amended. (R. 12-40).

The judgment and decree of the court simply reversed the decision of the lower court but did not remand it for trial. Under Kansas law this amounts either to the granting of a motion for summary judgment in plaintiff's favor or a declaratory judgment that the agency shop agreement in the instant case was invalid under the Kansas right to work constitutional amendment. *Gas Service Co.* v. *Con-*

solidated Gas, 150 Kans. 715, 718, 96 P. 2d 608; *Kotwitz* v. *Gridley Motor Co.*, 148 Kans. 676, 678, 84 P. 2d 903; *U. P. Rly. Co.* v. *Estes*, 37 K. 229, 15 P. 157; and Sec. 60-3303, Revised Statutes of Kansas, 1949. In any event such judgment is a final one, no further proceedings below having been directed, in process, or contemplated.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Involves Issues Of Sufficient Importance And Impact to Warrant Review by This Court.

This case involves an important question of the application of the National Labor Relations Act as amended, and of the effect of such Act in precluding efforts of a state to proscribe the so-called agency shop agreement, which has not been but should be settled by this court. Furthermore, the decision below is in conflict with such decisions of this court as *Hill v. Florida*, 325 U.S. 538; *Garner v. Teamsters Union*, 346 U.S. 485; and *San Diego Building Trades Council v. Garmon*, 359, U.S. 236.

The agency shop clause, well illustrated by the clause involved in the present case, constitutes a device customary in American industry, under which employees covered by collective bargaining agreements who are not or do not wish to become members of a union are required to bear their share of the cost of negotiating the conditions established under the agreement and of servicing the agreement during its term.

The "agency shop" clause has long been an important subject matter of collective bargaining between labor and management. Added impetus to the negotiation of such agreements was given by reason of the passage of the so-called "right to work" laws in many of the states under which unions are forbidden to make agreements requiring membership in the union as a condition of employment.

It is in "right to work" states in particular, as well as in other states where management is reluctant to agree to require its employees to become union members as a condition of employment, that the agency shop clause has become an important subject matter of collective bargaining, and it constitutes the sole means by which unions are able to obtain reimbursement for the costs of fulfilling their function as the exclusive bargaining representative of both union and non-union employees.

The agency shop clause in this case and elsewhere not only in no way compels any employee to become or remain a union member or ascribe to union policies but in fact expressly disavows any such requirement or purpose. Nevertheless, the State of Kansas has seen fit to outlaw such clauses on the ground that they contravene the state "right to work" law forbidding compulsory union membership. And in this case its supreme court has expressly held that Section 14 (b) of the National Labor Relations Act, which grants the states a free hand to proscribe any requirement of union membership as a condition of employment, similarly grants such free hand in respect to the collection of servicing fees as a condition of employment.

Section 8 (a) (3) of the National Labor Relations Act, as well as Section 14 (b) of that Act, speak solely in terms of "membership" in a labor organization. Neither those sections nor any other in the Act deal by express language with the subject matter of the collection of charges from employees for the time, effort and money spent by a bargaining representative in the negotiation and administration of terms and conditions of employment which are applicable to and equally benefit all within the bargaining unit. Furthermore, it can be demonstrated that there is no legislative history respecting the original Wagner Act or the present Taft-Hartley Act or particularly Section 14 (b) or the latter which indicates an intent to permit the states to proscribe the seeking or collection of such service charges by collective bargaining representatives. On the

contrary the legislative history discloses solely an intent to permit the states to deal with the subject of "compulsory unionism" whereunder employees were forced to join and to ascribe to the principles and policies of particular labor organizations. The principle "evil" which proponents of Section 14(b) sought to eradicate was the forcing of persons to join unions to obtain employment where such persons had scruples, religious, political or philosophic, against becoming a member of a particular union; that "evil" is of course not present in any agreement which simply requires employees covered by a collective agreement to pay a servicing fee for the costs of obtaining and administering such agreement. Nowhere in the Act's legislative history and nowhere in the Act itself is there any indication of a legislative intent to protect employees who accept the benefits of collective bargaining against the paying of their allocate portion of the costs thereof.

In view of the foregoing considerations, and since the negotiation of agency shop clauses constitutes a traditional and important subject matter of collective bargaining in industries affecting commerce, such clauses when negotiated in such industries must find protection or proscription under the National Labor Relations Act if the policies of that Act are to be achieved. Given a state right to intervene in other such subjects of bargaining, there can result only a crazy-quilt and chaotic pattern of agreement in interstate industries throughout the fifty states with a resultant dissipation of rights protected under Section 7 of the national Act. It is submitted that such cases as *Hill* v. *Florida*, 325 U.S. 538 (1957), *Garner* v. *Teamsters*, 346 U.S. 485 (1953) and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), are clear indications that the states may not trespass in this field. Unless this Court undertakes review of the decision below, a precedent will have been established which not only will adversely affect the operation of numerous labor organizations throughout the country but

also will go far to frustrate the federal government's national labor policy.

II.

The Federal Law Operates to Foreclose State Legislation Prohibiting the Negotiation, in Interstate Industries, of Agency Shop Agreements, and to Oust State Courts of Jurisdiction to Prohibit Enforcement of Such Agreements.

Hill v. *Florida*, *supra*, stands for the proposition that any state enactment which interferes with or frustrates the national labor policy as expressed in the National Labor Relations Act or related federal legislation must fall. *Garner* v. *Teamsters*, *supra*, holds that federal power of adjudication in the area of labor management relations embraced by the national labor policy must be exclusive and must supersede state power of adjudication if federal uniformity is to be realized. *San Diego* v. *Garmon*, *supra*, teaches that labor union activity which is either protected or proscribed by the National Labor Relations Act must be dealt with exclusively by the National Labor Relations Board.

The negotiation of collective agreements embracing traditional subject matters of collective bargaining constitutes not only activity protected under Section 7 of the National Labor Relations Act but the accomplishment of an ultimate and basic purpose of the entire Act. *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283 at 295 (1959); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342 at 346 (1944); and *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395 at 408 (1952).

It cannot be gainsaid and will be fully demonstrated if this petition is granted that the agency shop clause is an important and traditional subject matter of collective bargaining prevalent throughout American industry and particularly utilized in the so-called right to work states. Unlike the union shop clause requiring union membership as a

condition of employment, the "agency shop" clause as a subject matter of collective bargaining has not been expressly dealt with by Congress. Section 8(a)(3) and Section 14(b) deal only with agreements which require union membership as a condition of employment; Congress has distinguished between membership as such and the payment of a service fee or its equivalent as such. *Union Starch Refining Co.* v. *N.L.R.B.*, 186 F. 2d 1008 (7th Circuit) (1951), *cert. denied*, 343 U.S. 815 (1951). Accordingly the principles of *Algoma Plywood and Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949) are not applicable and states do not have the same free hand to proscribe agreements which require employees to pay a servicing fee as a condition of employment as they do respecting agreements which require an employee to become and remain a union member as a condition of employment.

Furthermore, the National Labor Relations Board has taken the issue in this case in hand. In 1950 (*Public Service Company*, 89 N.L.R.B. 418), and again in 1952 (*American Seating Company*, 98 N.L.R.B. 800), the National Labor Relations Board affirmed the validity of agency shop clauses.

In the early part of 1961, the National Labor Relations Board, with changed personnel, in a split decision declared the agency shop illegal under the National Labor Relations Act because it operated, in violation of Section 8(b)(1)(A), to interfere with the right of employees under Section 7 to refrain from assisting unions. *N.L.R.B.* v. *General Motors Corporation*, 130 NLRB No. 54 (1961). The Board has presently, and with another change of personnel, undertaken to re-examine its foregoing General Motors decision, and it is not beyond the realm of possibility that before this Petition is acted upon, the Board will again have upheld the validity of agency shop clauses under the Act. In any event, the Board has assumed jurisdiction of that issue. Whether the negotiation of such clauses is determined by the Board to be protected activity under Section 7 or proscribed activity under Section 8, that issue is more than "arguably" a sub-

ject for the Board exclusively to adjudicate, so that adjudication by the courts of Kansas is foreclosed.

CONCLUSION

It is respectfully submitted that for the reasons asserted above this petition for a writ of certiorari should be granted.

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APPENDIX A

OPINION AND JUDGMENT

HIGGINS v. CARDINAL MFG. CO.

Kansas Supreme Court

HIGGINS et al. v. CARDINAL MANUFACTURING COMPANY, INC., and GENERAL DRIVERS, ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION No. 498, IBT, et al., No. 42055, March 17, 1961

Appeal from an order sustaining a motion to dismiss nonunion employees' action for an injunction against application and a declaratory judgment as to the validity of an agency-shop contract under the right-to-work amendment to Kansas Constitution. Reversed.

J. D. Lysaught, Kansas City, Kan., Leonard F. Banowetz, Wichita, Kan. (J. E. Schroeder, Lee E. Weeks, and Leonard O. Thomas, Kansas City, Kan., and Jay W. Scovel and Robert K. Scovel, Independence, Kan., were with them on the briefs), for appellants.

Robert Fousek, Kansas City, Mo., and James H. Barnes, Kansas City, Kan., for appellees, Local Union No. 498 et al.

George E. McCullough, W. L. Parker, Jr., Robert B. Wareheim, Philip J. Saia, and Buford L. Shankel, Topeka, Kan., for Kansas State Federation of Labor, AFL-CIO, as amicus curiae.

Joseph Bukaty and James H. Barnes, Kansas City, Kan., for Central Labor Council of Kansas City, Kan., as amicus curiae.

T. M. Lillard and O. B. Eidson, Topeka, Kan., for Kansas State of Chamber of Commerce, et al., as amici curiae.

Full Text of Opinion

SCHROEDER, Justice:—The question presented by this appeal is whether an "agency shop" provision in a labor

contract is prohibited by the so-called "right to work" law of Kansas. The appellants are nonunion employees covered by the applicable collective bargaining agreement and brought this action to enjoin *application* of the contract, and to secure a declaratory judgment of the court to determine the validity of the "agency shop" provision in the contract. The appellees by cross appeal challange the jurisdiction of the court under the National Labor Relations Act.

Appeal has been duly perfected from an order sustaining a motion to dismiss a petition filed in the district court of Wyandotte County, Kansas. The motion was treated by both parties and the trial court as equivalent to a demurrer, since it challenged only the sufficiency of the petition to state a cause of action and the jurisdiction of the court as to the subject matter. Under these circumstances the well-pleaded facts in the petition are admitted, and the petition, not having been attacked by motion, is entitled to a liberal construction in favor of the pleader. The following facts are indicated by the petition.

The plaintiffs, Floyd M. Higgins, Oscar Waddell and Beulah Lamuel (appellants), are each residents of Wyandotte County, Kansas, and seniority employees in the production department of the defendant, Cardinal Manufacturing Company, Inc. (appellee), located in Kansas City, Kansas, were it is engaged in the business of the manufacture of television picture tubes and by-products.

The defendant, General Drivers Allied Automotive and Petroleum Local Union No. 498 (appellee), is a labor union and the duly certified bargaining agent for the employees of the defendant, Cardinal Manufacturing Company, Inc. The defendant, C. B. Butler (appellee), is president of the local union, which is an affiliate of the defendant, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The appellants brought the action as individuals and as

representatives of such employees of Cardinal "who are not now members of said Local Union No. 498, or who may hereafter resign membership therein."

On or about the 15th day of November, 1958, the employer, recognizing the union as the exclusive bargaining agency for all employees within the "bargaining unit" as certified by the National Labor Relations Board, entered into an elleged security agreement which provides in part as follows:

"ARTICLE III.

"No Discrimination—Equal Benefits—Equal Obligations.

"*Section* 1. *Agency Shop* (a) Membership in the Union is not compulsory. Employees have the right to join, not join, maintain or drop their membership in the Union, as they see fit. Neither party shall exert any pressure on or discriminate against an employee as regards such matters.

"(b) Membership in the Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefits. The Union is required, under this Agreement, to represent all of the employees in the bargaining unit fairly and equally without regard as to whether or not an employee is a member of the Union. The terms of this Agreement have been made for all employees in the bargaining unit and not only for members in the Union and this Agreement has been executed by the Employer after it has satisfied itself as the result of a secret ballot that the Union is the choice of a majority of the employees in the bargaining unit and the Union has been certified by the National Labor Relations Board.

"(c) In accordance with the policy set forth under subparagraphs (a) and (b) of this Article, *all employees shall, as a condition of continued employment, pay to the Union, the employees' exclusive collective bargaining representative, an amount of money equal to that paid by other employees in the bargaining unit who are members of the Union, which shall be limited*

to an amount of money equal in the Union's regular and usual initiation fees, and its regular and usual dues and its general and uniform assessments. For existing employees, such payments shall commence thirty (30) days following the date of execution of this Agreement and for new employees, the payments shall start sixty (60) days following the date of employment.

"(d) The Union agrees to indemnify the Company and hold the Company harmless from any final determination of liability to any employee by reason of the discharge of such employee if such discharge was caused or effected by a request of the Union, as provided for in the preceding paragraphs of this contract.

"The Company agrees to notify the Union of the pendency of any law suit which results from the discharge of an employee at the request of the Union within ten (10) days of the date of service of summons on the Company, and the Union obligates itself to defend the law suit.

"*Section 2.* The employer agrees to deduct from the pay of all employees covered by this Agreement who so authorize in writing, dues, initiation fees and or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions. Where laws require written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law.

"ARTICLE XVII.

"Extra Contract Agreements.

"The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.

• • •

"This Agreement shall be in full force and effect from November 15, 1958 to November 15, 1959, and shall continue in full force and effect from year to year thereafter unless written notice of desire to change or modify the Agreement is served by either party upon

> the other party at least sixty (60) days prior to the annual anniversary date." (Emphasis added.)

The appellants allege they "did not sign said agreement nor agree to the terms thereof, nor authorize any one to execute said agreement in their behalf, nor have they joined said Union, nor do they intend to become members of said Union, that said plaintiffs have paid no sums of money to said Local Union as purportedly required by said Article III, but have refused so to do."

The appellants then allege "by certified mail the defendant, Local Union No. 498 on or about February 10, 1959, did advise each of these plaintiffs that unless Local Union No. 498 received from each of them the sum of Twelve ($12.00) Dollars, by March 1, 1959, that the defendant, C. B. Butler, as President of said Local Union No. 498, would request the defendant, Cardinal Manufacturing Company, to discharge each of said employees. A copy of said notice is hereto attached, marked, 'Exhibit B', and made a part hereof."

In addition to the foregoing, which is a correct recitation of the substance of the notice, it recites:

> "In accordance with the Taft-Hartley law, the Union must represent all employees in the bargaining unit regardless as to whether they are members of the Union or not, therefore, the Union has a right to charge employees a fee in the amount of the Union's monthly dues for services rendered."

By reason of the foregoing facts the appellants allege the provisions of the contract, and in particular Article III thereof, are void and in violation of Article 15, Section 12 of the Constitution of the State of Kansas, commonly known as the "right to work amendment" adopted by the electors of the State of Kansas on the 4th day of November, 1958, and G. S. 1949, 44-803. They allege their threatened discharge for failure to pay the equivalent of initiation fees, union dues and assessments is in complete disregard of their "rights under the law and as citizens of

the State of Kansas," and that they will suffer irreparable harm and injury unless the court restrains and injoins the defendants from such threatened action.

By further appropriate allegations they seek a temporary injunction during the pendency of the action, a permanent injunction, and a declaratory judgment concerning the controversy.

Upon the filing of the petition the trial court issued a temporary restraining order. Thereafter a motion to dismiss the action for injunction, and to dissolve the temporary restraining order, was filed by the union challenging the jurisduction of the state court as to the subject matter under the National Labor Relations Act. and the sufficiency of the petition to state a cause of action under the laws of the State of Kansas.

The trial court overruled the motion on the jurisductional ground, but sustained it on the ground the petition did not state a cause of action. The basis for the trial court's ruling was that the agency shop provision was not within the scope of the Kansas "right to work amendment." Actually the trial court decided it had jurisdiction to interpret the Kansas law, but it did not reach the jurisdictional question under the National Labor Relations Act. To protect their rights the appellees cross-appealed to keep both jurisdictional questions open.

It is conceded by the parties interstate commerce is affected by the business of Cardinal Manufacturing Company, Inc. This is apparent from the petition which incorporates the contract by reference. Under applicable federal legislation, 29 U.S.C. § 141, *et seq.*, and particularly § 159(c) (1) thereof, the National Labor Relations Board must determine that a question of representation affecting interstate commerce exists before directing an election or certifying any union as the bargaining agent for the employees.

The issue of union security presented by this case brings

into focus a conflict between two firmly-held American beliefs: The belief that a worker should not be required to support an organization which he may oppose, and the belief that a worker should not be a "free rider" who takes advantage of benefits secured by a union without contributing his share to its support. That issue has been the subject of legislation at both the state and national levels.

The Kansas "right to work amendment" cannot be interpreted separate and apart from federal legislation affecting union-security agreements. In the evolution of Federal American Law three types of union-security provisions in collective bargaining agreements have commanded attention: (a) The *closed shop* provision requires membership in the contracting union before a job applicant can be employed and for the duration of his employment; (b) the *union shop* provision does not require an applicant to be a member of the union before he is hired, but it does require him to join, and usually to continue his membership in the union after he is hired; and (*c*) the *agency shop* provision requires nonunion employees, as well as union members, to pay union dues on the theory that the union as bargaining agent of all employees is entitled to the financial support of all.

Under the Wagner Act collective bargaining became the heart and core of labor relations and it has remained so. There were no restraints under federal law upon the extent to which provisions for compulsory union membership could be inserted in collective bargaining agreements. Under the closed shop proviso nothing in the federal law was held to illegalize the confirmation of voluntary *closed shop* agreements. States, however, were permitted to pursue their own more restrictive policies. (See *Algoma Plywood Co.* v. *Wis. Board*, 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct 584, 23 LRRM 2402.)

By the Labor Management Relations Act, 1947, commonly known as the Taft-Hartley Act (29 U.S.C., § 141, *et*

seq.) the closed shop provision in collective bargaining agreements was made illegal, but it did not abolish compulsory unionism. It gave sanction to the union shop in 29 U.S.C., § 158(a) (3).

Under section 14(b) of the Labor Management Relations Act, 1947, (29 U.S.C., § 164 [b]) Congress yielded to the states the authority to ban union shop agreements by providing:

> "Nothing in this subchapter [act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is by virtue of this provision that states are permitted to enact so-called "right to work laws," which escape federal pre-emption under the Labor Management Relations Act, 1947, even though interstate commerce is affected. (*Algoma Plywood Co.* v. *Wis. Board, supra.*)

The foregoing provision is *paramount* to sections 8(a) (3) of the Act (29 U.S.C., § 158 [a] [3]), which provides in part:

"It shall be an unfair labor practice for an employer—
* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that

membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

On the 4th day of November, 1958, the people of the State of Kansas, adopted an amendment to the Constitution of the State of Kansas, now designated as Article 15, Section 12, which reads:

> "No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization."

Although no legislation has been enacted in the State of Kansas pursuant to the foregoing constitutional amendment subsequent to its adoption on the 4th day of November, 1958, legislation on the subject was enacted in 1943 which presently appears as G. S. 1949, 44-803.

It is a settled rule of constitutional construction that prohibitive and restrictive constitutional provisions are self-executing and may be enforced by the courts independent of any legislative action, unless it appears from the language of the provision that the enactment of legislation is contemplated as a requisite to giving it effect. The foregoing principle has been recognized in *Woodworth* v. *Boules*, 61 Kan. 569, 60 Pac. 331; and *State ex rel.* v. *Mercantile Association*, 45 Kan. 351, 25 Pac. 984; see, also, *State, ex rel.* v. *Deck*, 106 Kan. 518, 188 Pac. 238; 16 C.J.S. Constitutional Law, § 49; and 11 Am. Jur., Constitutional Law, §§ 71 to 77.)

The collective bargaining agreement presently under consideration was executed by the employer and the union after the effective date of the foregoing constitutional

amendment. Therefore, the question whether the agency shop provision is valid under the above Kansas constitutional amendment is directly presented.

The appellees argue the amendment in no way refers to contracts requiring the payment of service fees to a labor union; that its provisions only prohibit the enforcement of collective bargaining contracts which require "membership" or "nonmembership" in labor organizations. They argue the language is simple, plain and completely unambiguous.

A constitution must be interpreted liberally to carry into effect the principles of government which it embodies. It deals broadly with general subjects, and its language should not be interpreted in any narrow, refined or subtle sense, but should be held to mean what the words imply to the common understanding of men. (*State* v. *Sessions*, 84 Kan. 856, 115 Pac. 641.) The constitution is not to be construed in a technical manner, but in ascertaining its meaning the courts consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it. (*Hunt* v. *Eddy*, 150 Kan. 1, 90 P.2d 747; and *State, ex rel.* v. *Fadely*, 180 Kan. 652, 659, 308 P.2d 537.)

Story was quoted with approval in *State* v. *Sessions*, *supra*, as follows:

> "'Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and can not be presumed to admit in them any recondite meaning or any extraordinary gloss.' * * *" (1 Story on the Const., 5th Ed., § 451.)

When interpreting or construing a constitutional amendment, the court must examine the language used and view it in connection with the general facts and circumstances which caused the amendment to be submitted. (*State, ex rel.* v. *Anderson*, 180 Kan. 120, 299 P.2d 1078.)

The basic issue upon which the campaign was conducted prior to the adoption of the constitutional amendment by the people of Kansas was whether or not the worker should be a "free rider" who takes advantage of benefits secured by a union without contributing his share to its support. Those supporting adoption of the amendment contended the worker should not be required to support a labor organization which he may oppose. Without question the people felt by adopting the amendment the decision would prevent the payment of forced tribute to any labor organization by any worker within the boundaries of this state.

It is apparent from the memorandum decision of the trial court that it looked for some specific provision in the Kansas constitutional amendment which prohibited the execution or application of a collective bargaining agreement requiring a nonmember employee to pay money to a labor union. Since no such specific provision was found, the trial court applied a narrow construction to the constitutional amendment.

The appellees contend Kansas was one of the last states of enact the so-called "right to work law." They argue approximately nineteen of the states enacted "right to work laws" prior to the adoption of the Kansas constitutional amendment: that ten prohibited the collection of fees or charges without the employees' consent; and that nine did not so provide, among these being the State of Kansas. It is argued that inasmuch as the state legislators' attention had already been directed to the broader type of restraining law (In 1951 Senate Bill No. 116, incorporating the more restrictive language failed to pass), and since there were in existence these two types of legislation dealing with

this subject matter, known to the legislature at the time the particular constitutional amendment was suggested, it must be considered conclusive the legislature did not see fit to incorporate in the specific statute the more restrictive language.

It is unnecessary to consider in detail the laws of other states, some of which are constitutional amendments and others statutory enactments by the legislatures of the respective states. The foregoing argument of the appellees will be answered as our opinion further develops.

In support of the trial court's decision the appellees rely on *Meade Electric Company* v. *Hagberg*, (Ind.), 159 N.E. 2d 408, 44 LRRM 2312. There the Second Division of the Indiana Appellate Court said the Indiana right to work law is plain and unambiguous, and there is no prohibition against a provision requiring the payment of fees or charges to a labor organization. It held the Indiana law merely prohibits agreements and conduct which conditions employment or *membership* in a labor organization.

The decision of the court that the proposed agency shop clause did not violate the Indiana right to work law, made consideration of further issues presented immaterial to its decision. The Indiana decision is analyzed by George Rose, an Indianapolis attorney, in an article entitled "*The Agency Shop* v. *The Right to Work Law*" in 9 Labor Law Journal, p. 579. For a different approach see an article by Norman E. Jones on "The Agency Shop" in 10 Labor Law Journel, p. 781.

In two particulars the Meade case must be distinguished from the facts presented by the instant appeal. First, the Indiana right to work law was a *legislative enactment* calling for a different rule of construction than is ordinarily applied to constitutional amendments. Second, the Indiana law contained a *penal* provision declaring violations thereof to be misdemeanors with penalties upon conviction as set forth therein. The Indiana court said in its opinion:

"The above-quoted Right to Work Law contains a penalty provision. The law is well settled that penal statutes will be strictly construed, and not construed to include anything *beyond its letter, though within its spirit*, and it cannot be enlarged by construction, implication or intendment beyond the fair meaning of the language used. *Van Arsdall* v. *Indiana Bell Telephone Co.* 1926, 84 Ind. App. 257, 259, 151 N.E. 19; *Evansville & Ohio Valley Railway Co., Inc.* v. *Southern Indiana Rural Electric Corporation, Inc.*, 1953, 231 Ind. 648, 652, 109 N.E.2d 901 * * *" (p. 412.)

Here the court is not confronted with a penal statute to be strictly construed, but a remedial constitutional amendment to be liberally construed to effectuate the purpose for which it was adopted.

Clearly our state courts have jurisdiction to construe and interpret Kansas law whether the agency shop clause in the instant case violates the Kansas constitutional amendment adopted pursuant to specific authorization granted by Congress. The construction of state constitutional and statutory provisions is left to the states in the first instance, if the state has authority to enact such law. (See, *Williams* v. *Oklahoma*, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421, rehearing denied, 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737.)

This court has held when the interpretation of a statute (not penal in nature) according to the exact and literal import of its words would defeat the manifest purpose of the legislature in its enactment, it should be construed according to its spirit and reason, disregarding as far as many be necessary, the strict letter of the law. (*Clark* v. *Murray*, 141 Kan. 533, 41 P.2d 1042.) One of the specific matters which may be considered in ascertaining the intention of the legislature, where it becomes material, is to fix what the situation was at the time of the enactment of the particular statute in controversy. (*Natural Gas Pipeline Co.* v. *Commission of Revenue & Taxation*, 163 Kan. 458, 183 P.2d 234; see, also *Hunziker* v. *School District*, 153

Kan. 102, 109 P.2d 115, and authorities cited therein.) These rules become material concerning interpretation of the legislative enactment of 1957 pursuant to which the "right to work amendment" was submitted for referendum.

The rule in favor of liberal construction and against strict construction of a *statute* applies with even greater force when the court is interpreting constitutional provisions. Constitutional provisions are of necessity concise and general in their terms, while statutes, in general, are more specific.

The Kansas legislature in drafting the constitutional amendment must have been fully aware of the only criteria of membership recognized by the National Labor Relations Act, as amended. By virtue of the language in section 8(a)(3)(B) of the Taft-Hartley Act, heretofore quoted, it is apparent that the authority granted under this section is not primarily to compel membership in the union, but to permit the unions to *require* workers to pay dues and initiation fees to support the union. This is made clear by the Supreme Court of the United States in *Radio Officers v. Labor Board*, (1954), 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323, 33 LRRM 2417. It was said in the opinion:

> "* * * Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. *This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about 'free riders,' i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason * * *" (pp. 40, 41.) (Emphasis added.)

In *Union Starch & Refining Co. v. National Labor Rel. Bd.*, (1951), 186 F.2d 1008, 27 LRRM 2342, employees who

had offered to pay their dues and fees were rejected by the union because they were unwilling to take the obligation of membership and their discharge was required. The Seventh Circuit Court upheld the National Labor Relations Board in ruling that the discharge was wrongful because if a union "imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job." In the opinion the court said:

> "We agree that the Union had the right, under the statute here involved, to prescribe nondiscriminatory terms and conditions for acquiring membership in the Union, but we are unable to agree that it may adopt a rule that requires the discharge of an employee for reasons other than the failure of the employee to tender the periodic dues and initiation fees * * *" (p. 1012.)

Similar decisions have been made under the 1951 amendment to the Railway Labor Act (45 U.S.C., § 152, Eleventh) which permits carriers and unions to enter into union shop agreements. (*Pennsylvania R. Co.* v. *Rychlik*, [1957], 352 U.S. 480, 1 L.Ed.2d 480, 77 S.Ct. 421, 39 LRRM 2421; and *Railway Employes. Dept.* v. *Hanson*, [1956], 351 U.S. 225, 100 L.Ed. 1112, 76 S.Ct. 714, 38 LRRM 2099.

The distinction between the Railway Labor Act expressly permitting union shop contracts, notwithstanding state laws, and section 14(b) of the Taft-Hartly Act was noted in the Hanson case.

It is clear from the foregoing decisions, construing the union shop sections of the above two acts, Congress intended that an employee who paid the required union initiation fees and dues fulfilled his obligation under a union shop contract, and that *the union could not require any other act as a condition of employment* usually required prior to becoming a member. Therefore, since the payment of union dues and fees is the only support of the union permitted by federal law *for unions to require as a condi-*

tion of employment under union-security agreements, and not actual membership, the expression "membership in a labor organization as a condition of employment" in section 14(b) of the Taft-Hartley Act becomes synonymous with payment of union dues and fees for enforcement purposes under union-security agreements so far as labor unions or employers are concerned.

It may be conceded the term "membership" in any organization when standing alone and in its ordinary significance imposes various responsibilities and confers various privileges upon members. It also clothes the officers of the organization with authority to exercise certain disciplinary measures upon members. However, the term to be construed in this case is not simply "membership in a labor organization," but the more restriced expression "membership in a labor organization *as a condition of employment.*" Under these circumstances the language used by the Kansas legislature in drafting the constitutional amendment submitted for referendum assumes added significance, and the wording is not as clear and unambiguous as appellees would have us believe.

The natural and logical interpretation of the Kansas constitutional amendment, prohibiting compulsory membership in a labor organization as a condition of employment or continued employment, includes by necessary implication a prohibition against forced payment of initiation fees, union dues and assessments, or the equivalent, by a worker to a labor organization as a condition of employment or continued employment. This, we think, is the real and rather well-hidden meaning of the language employed and decisions, above discussed, and it must have been by the legislature of Kansas in drafting the constitutional amendment submitted for referendum. The legislature must be considered to have been aware of the existing laws aware that the courts have considered the required payment of union dues and fees as compliance with a contract provision requiring union membership, since under a union

shop provision, payment of dues and fees was all that could be required *as a condition of employment*. Thus, the legislature must have decided it was unnecessary to include a more explicit provision in the amendment, or that to do so would have been superfluous.

The alternative *would* require this court to declare that the constitutional amendment serves no useful purpose at all. It would permit the appellees to circumvent its natural and logical interpretation.

The question presently before the court was presented to the Arizona Superior Court in *Arizona Flame Restaurant, Inc.* v. *Baldwin*, 26 Labor Cases, ¶ 68,647; 34 LRRM 2707, affirmed as modified, *Baldwin* v. *Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759, 40 LRRM 2375. The Arizona right to work amendment, A.R.S. Arizona Constitution, Article XXV (section 56-1302. A.C.A. 1952 Supp.; section 23-1302, A.R.S.) contains language almost identical to the Kansas constitutional amendment. There the defendant union demanded that the employer execute an agreement containing an agency shop clause, among others, in spite of the Arizona constitutional provision. The employer refused and picketing was commenced to enforce the union's demand (conduct beyond the facts in the instant case). Action was instituted to enjoin the picketing. In the opinion the trial court said:

> "* * * it is clear that it was the intent of the electorate to forbid both management and labor from imposing the requirement upon any person, as a condition of his employment, the participation by him in any form or scheme of employee representation. Consequently, it would require a most narrow and unrealistic construction of the existing laws to sanction a contract that would require employees not belonging to a union to contribute an assessment equal to the union dues to obtain or retain employment * * * This Court's duty, under the evidence herein, becomes clear with respect to a holding that the agency shop clause violates the law of this State." (p. 87,172.)

On appeal the Supreme Court of Arizona found it unnecessary to determine whether the agency shop clause was lawful in the State of Arizona on the ground that the point had been abandoned.

The foregoing interpretation or construction of the Kansas constitutional amendment is in keeping with the common understanding of the citizens of Kansas who, after listening to and reading the arguments on both sides in a well-publicized campaign prior to the general election at which the matter was submitted for referendum, understood that adoption of the amendment would prevent the payment of forced tribute to any labor organization as a condition of employment by any worker within the boundaries of this state.

We hold the so-called "agency shop" provision in the contract here under attack violates Article 15, Section 12, of the Kansas Constitution, declaring the public policy of the state as determined by popular vote of the people of Kansas.

The appellees contend the legislative history of the Kansas constitutional amendment indicates the legislature did not intend to forbid the "agency shop" provision in union-security agreements. They cite failure of Senate Bill No. 116, incorporating more restrictive language, to pass in the 1951 session of the legislature. This argument is at best highly speculative. Wholly aside from the reasons heretofore assigned for our conclusion, the legislature must have recognized in 1951 the laws of Kansas already included legislation adopted in 1943, now appearing as G. S. 1949, 44-803. It provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and such employees shall also have the right to refrain from any or all such activities."

The forgoing statutory language is identical to section 7 of the Taft-Hartley Act (29 U.S.C., § 157), omitting the exception authorized in section 8(a) (3) of the act. Thus, while the Wagner Act was still in full force and effect, the legislature of Kansas had declared that which was against the public policy of the State of Kansas. In *Binder* v. *Local Union No. 685*, 181 Kan. 799, 317 P.2d 371, 41 LRRM 2207, it was said:

> "Applicable Kansas statutes provide for the rights of employees, define the unlawful acts of an employer, or any other person, *and provide that which is against the public policy of this state.*" (p. 804.) (Emphasis added.)

The right of employees guaranteed in the foregoing statute to refrain from assisting labor organizations includes the right to refrain from giving financial assistance as well as personal assistance. In other words, 44-803, *supra*, prohibits forced payment of union dues and fees by employees to labor organizations. It is therefore logical to assume the legislature in 1951 may have considered it unnecessary to submit a constitutional amendment on the same subject for referendum.

Are the provisions of the Kansas constitutional "right to work amendment," as above construed, consistent with section 14 (b) of the National Labor Relations Act, as amended? Embraced within this question is whether a state is permitted to invalidate contracts making employment conditional on the payment of dues and fees to a labor organization.

What has heretofore been said concerning the federal law, particularly the discussion leading up to construction of the expression "membership in a labor organization as a condition of employment" used by Congress in section 14(b) of the Taft-Hartley Act, relates directly to the above question.

It is immaterial to our decision herein that the agency shop provision of the contract here under attack labels the

charge to employees, as a condition of continued employment, "*an amount of money equal to* that paid by other employees in the bargaining unit who are members of the Union, which shall be limited to *an amount of money equal in* the Union's regular and usual initiation fees, and its regular and usual dues and its general and uniform assessments." (Emphasis added.) This is nothing more than camouflage and is in substance a charge for union dues and fees within the meaning of section 8 (a) (3) (B) of the Taft-Hartley Act.

But for the Kansas "right to work" law the agency shop provision would presumably be a proper subject of negotiation in a collective bargaining agreement under the Taft-Tartley Act. (*Public Service Company of Colorado,* [1959], 89 N.L.R.B. 418, 26 LRRM 1014; and *American Seating Company,* [1952,] 98 N.L.R.B. 800, 29 LRRM 1424.) Recently the National Labor Relations Board in *General Motors Corp.,* (Feb. 20, 1961), 1961 C.C.H., ¶9663, p. 14,978, 130 N.L.R.B. No. 54, 47 LRRM 1306, in a three to two decision held that an employer does not violate the National Labor Relations Act, as amended, by refusing to bargain with a union with respect to the inclusion in a bargaining contract, covering workers in a state which has a "right to work" law, of an agency shop provision which requires nonunion workers to pay to the union, as a condition of continued employment, a fee equivalent to the dues and initiation fees paid by union members even though the agency shop is lawful under the state law. (See, *Meade Electric Company* v. *Hagberg,* [Ind.], *supra.*)

The material language in section 14 (b) of the Taft-Hartley Act is "agreements requiring *membership in a labor organization as a condition of employment.*" (Emphasis added.) Prior to the adoption of section 14(b) the legislatures of some states had adopted more detailed, technical statutory enactments dealing with this subject. Not being in the broad form of constitutional amendments, these statutes provided not only that the right to work should not be

abridged by reason of membership or nonmembership in labor organizations, but also contained the more detailed language, made possible by the legislative process, forbidding, in substance, any payments to any labor union or labor organization as a condition of employment or continued employment. Clearly, Congress had these state laws in mind prior to and at the time section 14 (b) was enacted.

This is evidenced by the report of the managers on the part of the House which states with reference to section 13 of the House Bill (HR 3020) and section 14 of the conference committee amendments:

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, *maintenance of membership, or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to *make all form of compulsory unionism* in those States illegal. *It was never the intention* of the National Labor Relations Act, as is disclosed by the legislative history of that Act, *to preempt the field* in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8(3) of the existing Act nor the union shop and maintenance of membership proviso in section 8(a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect." (93 Cong. Rec., June 4, 1947, p. 6378.) (Emphasis added.)

With this background and the expressed intent of Congress to leave the states free to prevent all forms of compulsory unionism, and taking into consideration many other states which have adopted detailed statutes, and

many states such as Kansas which have adopted the broader use of constitutional amendments designed to accomplish the same purpose, there is little question that Congress and many state legislatures have construed the words "membership in a labor organization as a condition of employment" as embracing and including forced payments to unions of dues, fees and other charges regardless of the appellation applied thereto.

Obviously, if this were not true and the "agency shop" provision in a union-security agreement is not within the compass of section 14(b), statutes in those states in which the more detailed language has been used prohibiting forced payments to unions of dues, fees and other charges would fall by their own weight. In view of the language used in section 14(b) there seems to be little purpose for the states to enact laws or adopt constitutional amendments in the more detailed terminology. The language used in the Kansas constitutional amendment is substantially the same language used in section 14(b).

The fallacy of the trial court's decision, as reflected by its memorandum, is that it assumes Congress intended section 14(b) as a grant of authority to the states to enact "right to work" laws which prohibit the agency shop provision, requiring workers to pay the regular union dues, fees and assessments, but refuses to construe the Kansas constitutional amendment, not having contained such specific provision, although worded in substantially the same language as section 14(b), in the same manner. Section 14(b), like the Kansas amendment, contains no specific provision prohibiting agreements which require workers to pay dues, fees and assessments, as a condition of employment. Such a prohibitory provision is, for the reasons mentioned, necessarily implied, the payment of such sums to the union being an incident of union membership. The trial court, having correctly assumed that such a prohibitory provision was implied in section 14(b), was completely

inconsistent in holding that it was not also implied in the Kansas constitutional amendment.

Does a state court have jurisdiction to grant the injunctive relief requested by the appellants or is this matter within the exclusive domain of the National Labor Relations Board under the federal pre-emption doctrine?

Section 14 (b) of the Taft-Hartley Act was before the United States Supreme Court in *Algoma Plywood Co.* v. *Wis Board*, 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 548, 23 LRRM 2402. There the Wisconsin Employment Relations Board ordered an employer to cease and desist from giving effect to a *maintenance of membership clause* in a collective bargaining agreement on the ground that such clause was in violation of state statute. On writ of certiorari the Supreme Court affirmed *the power of the state to enforce its statute*. The opinion notes that 95% of the employer's production was sold in interstate commerce. In the opinion it was said:

> "* * * Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts, surely they would have made their purpose manifest * * *." (p. 306.)

After a review of the legislative history, the court went on to state:

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of *union-security agreements: Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive* * * *
>
> "* * * But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a *union-security contract*, such as discharging an employee, which under the circumstances 'is prohibited' by the

State, the legislative history of the section would dispel it. See S. Rep. No. 105, 80th Cong., 1st Sess. 5-7; HR., Rep. No. 245, 80th Cong, 1st Sess 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60; 93 Cong. Rec. 3554, 3559, 4904, 6383-84, 6446; HR. 3020, 80th Cong., 1st Sess., as reported, § 13." (pp. 313, 314.) (Emphasis added.)

While the court in Algoma was not comfronted with an agency shop provision in a collective bargaining agreement, as here, it did involve *the application* of an agreement containing a union-security provision, a maintenance of membership clause in a union shop provision. It was not complicated by independent conduct defined as an unfair labor practice under the National Labor Relations Act or the Taft-Hartley Act. We are confronted solely with *the application* of a contract containing a union-security provision, an agency shop provision, and except insofar as *execution or application of the agreement* itself may also involve a protected or prohibited activity under the Taft-Hartley Act, the case is not complicated by independent conduct which may arguably be a protected or prohibited activity under the act.

The union contends the Algoma decision has been overruled by *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board et al*, 338 U.S. 953, 94 L.Ed. 588, 70 S.Ct. 491, 25 LRRM 2395. There certiorari was granted and the Supreme Court of Wisconsin reversed in a *per curiam* decision by the United States Supreme Court, citing *Bethlehem Co.* v. *State Board*, 330 U.S. 767, 91 L.Ed. 1234, 67 S.Ct. 1026, 19 LRRM 2499; and *La Crosse Tel. Corp.* v. *Wis. Board*, 336 U.S. 18, 93 L.Ed. 463, 69 S.Ct. 379, 23 LRRM 2236. (See, *Wisconsin E. R. Board* v. *Plankinton Packing Co.*, 255 Wis. 285, 38 N.W.2d 688, 24 LRRM 2325.) We do not agree. While it is true the Wisconsin court cited the Algoma decision as authority for its ruling, it does not follow that the *per curiam* reversal overruled Algoma. In Algoma the court was confronted with the *application* of a union-security provision in a collective bargaining agree-

ment, while in Plankinton the facts disclosed *independent conduct* intended to coerce and intimidate the complainant and to bring about his loss of employment because he had exercised his right to refrain from membership in the respondent union. It also involved conduct by the officers, agents and employees of the respondent union intended to coerce, intimidate and induce the respondent employer to discharge the complainant. This independent conduct fell within the category of unfair labor practices prohibited by section 8 of the Taft-Hartley Act and was within the domain of federal pre-emption.

The union also relies on United States Supreme Court opinions involving complaints that certain activities of unions violated a state "right to work" law. They cite *Local Union 429, International Brotherhood of Electrical Workers, A. F. of L., et al.* v. *Farnsworth & Chambers Co., Inc.*, 353 U.S. 969, 1 L.Ed.2d 1133, 77 S.Ct. 1056, 40 LRRM 2106; and *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 2 L.Ed. 2d 151, 78 S.Ct. 206, 41 LRRM 2169.

In Farnsworth a representative of the union approached the employer and protested that the employer was not employing union labor and threatened to vacate the plant if union laborers were not employed. Upon refusal peaceful picketing resulted, and injunctive relief followed. Certiorari was granted and the Tennessee court reversed in a *per curiam* decision, citing *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L.Ed. 546, 75 S.Ct. 480, 35 LRRM 2637; and *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161, 33 LRRM 2218. (See *Farnsworth & Chbrs.* v. *I.B.E.W.* 429, 201 Tenn. 329, 299 S.W.2d 8, 39 LRRM 2540.) On similar facts this court recognized the domain of federal pre-emption in *Kaw Paving Co.* v. *International Unions of Operating Engineers*, 178 Kan. 467, 290 P.2d 110, 37 LRRM 2387.

In the Youngdahl case the employees of the plant were not members of a labor union. In an effort to compel the

employer to recognize the union as the bargaining agent of the employees, some of the employees struck and picketed the plant. The picketing was accompanied by conduct calculated to provoke violence, and the trial court issued a blanket injunction against all conduct which the Arkansas Supreme Court affirmed. The United States Supreme Court reversed to the extent that the injunction prohibited peaceful picketing of the employer's premises. There the board had not conducted a representation election nor had the union been certified. In an election conducted after the injunction was issued a majority of the employees voted not to be represented by the union.

These cases do not control the facts presently before the court, since neither related to either the *execution or application of agreements* requiring membership in a labor organization as a condition of employment. Insofar as federal pre-emption was asserted they relate to independent conduct which was either protected or prohibited under the Taft-Hartley Act.

In reliance upon the provisions of section 14(b) the union contends, regarding agreements prohibited by state law, that "the employer and Union negotiating such a contract in Kansas would violate Section 7 of the National Labor Relations Act and in this case the employer would violate Section 8(a)(1) of the National Labor Relations Act by interfering with the rights of employee guaranteed by Section 7 and also violate Section 8(a)(3) of the Act by discrimination in regard to a term or condition of employment for the purpose of encouraging membership in a labor organization. The Union would violate 8(b)(1) of the Act by restraining employees in the exercise of their rights guaranteed by Section 7 and the union would violate 8(b)(2) by causing an employer to discriminate against an employee in violation of Section 8(a)(3)." Therefore, it is argued control over such conduct falls within the domain of federal pre-emption and is governed exclusively through

the National Labor Relations Board. They rely upon *San Diego Unions* v. *Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773, 43 LRRM 2843, which is the second appearance of the case before the United States Supreme Court. There the unions sought from the respondents an agreement to retain in their employ only those workers who were already employees of the union, or who applied for membership within thirty days. The respondents refused claiming that none of their employees had shown a desire to join the union, and that in any event they could not accept such arrangement until one of the unions had been designated by the employees as a collective bargaining agent. The unions began at once to peacefully picket the respondents' place of business, and to assert pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The sole purpose of these pressures was to compel execution of the proposed contract. This conduct was held to be within the domain of federal pre-emption under the Taft-Hartley Act.

On similar facts nearly two years before the second Garmon decision was announced this court applied the doctrine of federal pre-emption in *Asphalt Paving* v. *Local Union*, 181 Kan. 775, 317 P.2d 349, 41 LRRM 2194, in which the provisions of section 14(b) of Taft-Hartley were asserted.

We are not unmindful of the broad sweep of the language used in the second Garmon decision and particularly the following language which appears to summarize the doctrine of federal pre-emption:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield • • •" (p. 244.)

and further in the opinion where the court says:

> "• • • When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the

National Labor Relations Board if the danger of state interference with national policy is to be averted," (p. 245.)

However, in view of Algoma, to which the Federal Supreme Court adheres as we construe the decisions, we do not regard the second Garson decision as controlling of the facts in the instant case. Algoma was cited with approval in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L.Ed. 546, 75 S.Ct. 480, 35 LRRM 2637, which dealt with federal pre-emption under the Taft-Hartley Act, in the following language:

> "The Court allowed a State to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 23 LRRM 2402. Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State." (p. 477.)

As recently as January 19, 1959, the Supreme Court pointed out the special position occupied by the states under section 14(b) of Taft-Hartley. The following footnote appears in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296, 297, 3 L.Ed.2d 312, 79 S.Ct. 297, 43 LRRM 2374:

> "10. In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through § 8(3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 U.S., at 312, 23 LRRM 2402."

The union's contention that state authority is ousted because the union was certified by the National Labor Relations Board was answered in Algoma as follows:

> "It remains to consider whether certification of the Union by the National Labor Relations Board in 1942 thereby forever ousted jurisdiction of the Wisconsin

to enjoin practices forbidden by Wisconsin law. Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. *The character of activities left to State regulation is not changed by the fact of certification.* Certification, if it is true, makes clear that the employer and the union are subject to federal law, but that is not disputed. So far as the relationship of States and national power is concerned, certification amounts to no more than an assertion that as to this employer the State shall not impose a policy inconsistent with national policy, *Hill* v. *Florida*, 325 U.S. 538, 16 LRRM 734, or the National Board's interpretation of that policy, *Bethlehem Steel Co.* v. *New York S. L. R. B.*, 330 U.S. 767, 19 LRRM 2499; *La Crosse Telephone Co.* v. *Wisconsin E. R. B.*, 336 U.S. 18, 23 LRRM 2236. *Indeed, the express disclaimer in § 8(3) of the National Labor Relations Act of intention to interfere with State law and the permission granted the States by § 14(b) of the Taft-Hartley Act to carry out policies inconsistent with the Taft-Hartley Act itself, would be practically meaningless if so easily avoided. For these provisions can have application, obviously, only where State and federal power are concurrent; it would have been futile to disclaim the assertion of federal policy over areas which the commerce power does not reach.*" (pp. 314, 315.) (Emphasis added.)

In *Bus Employees* v. *Wisconsin Board*, (1951), 340 U.S. 383, 95 L.Ed. 364, 71 S.Ct. 359, 27 LRRM 2385, it was said Congress knew full well that its Labor legislation preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and demonstrated its ability to spell out with particularity those areas *in which it desired state regulations to be operative*, citing among other section 14(b) of the Taft-Hartley Act.

As we construe the decisions of the United States

Supreme Court the question presented by the instant case is not whether the union or the employer might be guilty of unfair labor practices under the Taft-Hartley Act in executing the labor relations agreement in controversy containing the agency shop provision, or in its application. In yielding to the states permission to enact "right to work" laws by section 14(b), Congress granted authority to the state courts to process violations of such laws. There would be little point in permitting the states to enact such laws if they could not be enforced by the states.

Several Kansas works have been published since the adoption of the Kansas "right to work amendment:" Benowetz, Is Compulsory Unionism Now Barred in Kansas?, 27 J.B.K. 207 (1958); Beaty, The Agency Shop Agreement and the Right-to-Work Law, 27 J.B.K. 348 (1959); and Hopson, Whither Hurried Hence—The New Right to Work Amendment, 8 Kan. L. Rev. 18.

In conclusion we hold the decision of the district court violates the true intent and purpose of the Kansas constitutional amendment (Art. 15, § 12), commonly known as the "right to work amendment," which is properly within the scope of section 14(b) of the Taft-Hartley Act pursuant to which it was adopted, and the courts of this state have jurisdiction to process violations of such amendment.

The order of the lower court sustaining the motion to dismiss the action is reversed.

MEMORANDUM OPINION

District Court of Wyandotte County, Kansas, Division Number 3, March 18, 1960

This matter is pending before me on a motion to dismiss as to the defendants General Drivers Allied Automotive and Petroleum Local Union No. 498 and C. B. Butler on the grounds that the Court is without jurisdiction of the subject matter and that the petition does not state a cause of action. This is in substance a demurrer to the petition.

The pertinent allegations of the petition are that plaintiffs are employees of the defendant Cardinal Manufacturing Company, that said defendant and the defendant Union have entered into a contract governing employees of the Manufacturing Company which contains an agency shop agreement. A copy of the contract is attached to the petition. By the terms of this agreement, employees are not required to become members of the Union, but those who are not members are required to pay to the Union an amount equal to that paid by Union members, which is, of course, an amount equal to initiation fees, dues, and assessments, and the contract recites that this is in consideration of the equal contract benefits and the equal representation by the Union of all employees. The petition further alleges that such an agreement is in violation of G.S. 1949, 44-803, and the Right to Work Amendment to the Constitution of the State of Kansas, that plaintiffs did not sign the agreement or authorize anyone to sign for them and have refused to pay any such charges, and that by reason thereof the defendants have threatened to discharge the plaintiffs. The plaintiffs pray that the Court determine the validity of such an agreement and adjudicate the rights of the parties, and that pending such determination the defendants be restrained from all action designed to cause the plaintiffs' discharge.

For the purpose of this motion, it has been stipulated that the defendant Manufacturing Company was at all times engaged in interstate commerce within the scope of applicable federal legislation.

The defendants contend, first, that this Court has no jurisdiction of the subject matter of this action for the reason that exclusive jurisdiction over such matters is vested in the National Labor Relations Board, and both parties have argued extensively the question of federal preemption in the field of labor relations. Plaintiffs rely primarily upon the case of *Algoma Plywood and Veneer Company* v. *Wisconsin Emp. Rel. Bd.*, 336 U.S. 301, decided in 1949. The more recent pronouncements of the Supreme Court of the United States, and particularly the very recent case of *San Diego Building Trades Council* v. *Garmon*, 79 S. Ct. 773, raise a serious question as to the jurisdiction of this Court to regulate activity which is arguably subject to Sections 7 or 8 of the Taft-Hartley Act. But in this case the plaintiffs' petition asks more than that this Court regulate or enjoin certain activities of the defendants. It alleges that the agency shop provision of the contract violates certain specific laws of this state and prays the Court to determine the rights of the parties thereunder. This raises the further question then as to whether this Court has jurisdiction to determine the validity and the effect of the laws of the State of Kansas in the first instance without prior reference to the National Labor Relations Board. This is a court of general jurisdiction and unquestionably, in my opinion, it has such jurisdiction, and I know of no law or decision to the contrary. The defendants' motion to dismiss for lack of jurisdiction of the subject matter will therefore be overruled.

The defendants urge, secondly, that the plaintiffs' petition does not state facts sufficient to constitute a cause of action against the defendants. This poses the sole legal question as to whether the agency shop provision of the

contract involved herein does in fact violate the laws of the State of Kansas.

G.S. 1949, Section 44-803, of the Revised Statutes of Kansas provides:

> "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and such employees shall also have the right to refrain from any or all such activities."

Although this Act provides that employees may not be compelled to join or "assist" a labor union, the evident purpose of the Act was to guarantee to employees the right to organize and join labor unions and to bargain collectively, and conversely to refrain from such activities. This particular act was placed on the statute books of Kansas in 1943 and is substantially identical to similar acts adopted in many other states. In general it is the type of legislation that preceded right to work laws and there is nothing in its legislative history or subsequent judicial interpretation that suggests that it was intended or ever considered to be sufficient in scope to deal with the specific problem for which right to work laws were subsequently enacted. For this reason and the reasons hereinafter discussed, it is my opinion that the above statute does not prohibit the type of agreement involved in this case.

Such a prohibition, if it exists, must be found in our Right to Work Law adopted by Constitutional Amendment in 1958. This law is found in Article 14, Section 12, of the Kansas Constitution, and provides as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the State nor any subdivision thereof, or any individual corporation, or any kind of association enter into any agreement, written or oral, which excludes any person

for employment or continuation of employment because of membership or nonmembership in any labor organization."

It is apparent that this amendment contains no reference to contracts requiring the payment of money to a labor union. It is directed specifically against agreements which exclude a person from employment because of "membership or nonmembership" in a labor organization. The language of this amendment is plain and unambiguous and on its face does not prohibit the type of agreement involved in this case.

The plaintiffs allege, however, that the agency shop provision of the contract is a subterfuge to avoid the laws of Kansas. In order to sustain the plaintiffs' position, it must be found that a prohibition against the payment of such charges to a labor union is embraced within the purpose and intent of our Right to Work Law. In this respect it is helpful to consider some of the legislative history of this law.

The first right to work law was adopted in 1944, and insofar as I have been able to determine Kansas is the last of twenty states which have adopted such a law, either in the form of a legislative enactment or a constitutional amendment. All but five of these laws, in addition to the provisions found in our Right to Work Law make specific provision against the collection of fees or charges of any kind by a labor union without the employee's consent. Furthermore, such a specific prohibition was contained in a bill presented to our Legislature in 1951 (Senate Bill No. 116), which failed to pass. Considering the fact that there are these two types of legislation dealing with this subject and that this was known to our Legislature, it must be considered as significant that the Right to Work Amendment submitted to the voters of this state by our Legislature does not contain any such specific prohibition against an agency shop provision.

Nor, in my opinion, can it be considered that the payment of such charges to a union by nonmembers is equivalent to compulsory membership in a union and thus within the scope of our Right to Work Amendment. While the financial obligation to pay initiation fees, dues, and assessments to a union may be the primary obligation of membership and may be the only participation which a great many members take in union affairs, it is not in my opinion equivalent to membership. Membership in any such group entails other responsibilities as well as privileges on the part of the members, such as the right to vote and to participate in the internal affairs of the union. It also clothes the union with certain powers such as disciplinary measures to which nonmembers are not subject. The question as to whether the amount required to be paid by a nonunion member is reasonable or not is not in issue and is not determined here.

The foregoing reasons, together with the plain language of the Amendment itself, leads me to conclude that our Right to Work Law was intended to prohibit only those agreements which condition employment upon membership or nonmembership in a union.

Since the plaintiffs' right to employment is not abridged on account of membership or nonmembership in a union under the terms of the agency shop agreement involved here, it is my opinion that such agreement does not violate our Right to Work Law and that the defendants' demurrer should therefore be sustained.

Further argument was had in the cause on November 9, 1959, and the trial court thereafter rendered a further opinion in letter form under date of November 18, 1959, which, omitting preliminary matter, and signature, is as follows:

> I have considered the arguments of counsel and the authorities cited at the rehearing before me on November 9, 1959. Needless to say, counsel on both sides have

shown an excellent grasp of the subject and the arguments before me have been most helpful.

Since the date of the first hearing I have also had the benefit of various articles on the subject which fully present the background and legislative history of agency shop contracts and the arguments pro and con as to their legality under right to work laws. Some of these articles are as follows:

1. Beaty, The Agency Shop Agreement and The Right to Work Law, 27 Kan. B. J. 348 (1959).
2. Hopson, Whither Hurried Hence--The New Right to Work Amendment, Vol. 8, Kan. Law Review, No. 1, page 18.
3. Jones, The Agency Shop, Nov. 1959, Labor Law Journal.
4. Rose, The Agency Shop v. Right to Work Law, 9 Labor Law Journal 579 (Aug. 1958).

It would serve no useful purpose to write an extended opinion in this case since it would only elaborate on the original opinion filed herein, and the final word in this matter must be spoken by our Surpeme Court in any event. Anyone interested in the problem will find both sides presented in the articles above referred to. I am still of the opinion that the term "membership" in a labor organization connotes something more than the mere payment of a charge for financial support of the union.

Agency shop agreements are not of recent origin. They have been used in various ways since 1942, although they are now becoming more prevalent and since the adoption of right to work laws in the various states have received increasing publicity. At the time our Right to Work Law was adopted it was well established that an agency shop was a fair subject for negotiation in a collective bargaining agreement under the National Labor Relations Act (Public Service Co., 89 N.L.R.B. 418 (1950); American Seating Co., 98 N.L.R.B. 800 (1952)). Of the nineteen states who now

have right to work laws, eleven have included a specific prohibition against the compulsory payment of charges to a union and nine states (instead of five as reported in my original decision) have no such prohibition. With this background our Legislature chose to submit to the voters a law which contained no such prohibition. The language of the law is plain and unambiguous, and under such circumstances I do not believe that an agency shop agreement is prohibited by our Right to Work Law. I believe that this is in accord with the better reasoning and the weight of such authority as there is on this subject. If it is desired to prohibit such agreements, then our law should be changed by the Legislature.

I still question the reasonableness of the fee required to be paid under the agency shop agreement involved in this case insofar as it is equivalent to the usual initiation fee and general assessments charged by the union. Both of these sound of increment to the union for purposes other than bargaining. However, neither party has shown any inclination to argue this point; and as stated in my previous opinion the reasonableness of the fee is not before me and is not decided here. I only hold that our Right to Work Law does not prohibit an agency shop agreement.

This ruling is to be effective as of the date an approved journal entry is submitted for my signature.

The Court's order on the motion which was treated as a demurrer, omitting caption and signatures, is as follows:

JOURNAL ENTRY

And now on this 16th day of April, 1959, the above-entitled action comes regularly on for hearing, on the motion to dismiss of the defendants, General Drivers Allied Automotive and Petroleum Local Union No. 498 and C. B. Butler as to said defendants, on the grounds that the Court

is without jurisdiction of the subject matter, and the petition does not state a cause of action.

Plaintiffs appear by their attorneys, Leonard F. Banowetz, Lee E. Weeks and J. Donald Lysaught. Defendant, Cardinal Manufacturing Company, appears by its attorney, Joseph H. McDowell. Defendants, General Drivers Allied (Automotive) (*sic*) and Petroleum Local Union No. 498 and C. B. Butler appear by their attorneys, Robert S. Fousek and James H. Barnes.

The Court, having heard the arguments of counsel, and having reviewed the pleadings takes this matter under advisement.

And now on this 23rd day of September, 1959, the Court announces its findings, but orders that no order or judgment on such findings be entered until the submission of an approved journal entry for the Court's signature.

The Court finds that for the purpose of this motion, it has been stipulated that the defendant, Manufacturing Company, was at all times engaged in interstate commerce within the scope of applicable Federal Legislation, and the Court further finds that said defendants' motion to dismiss is in substance a demurrer to plaintiffs' petition and has been treated as a demurrer by counsel for all parties and by the Court.

The Court further finds that plaintiffs' petition alleges that the agency shop provision of the contract violates specific laws of the State of Kansas and that this Court has jurisdiction to determine the validity and effect of the laws of the State of Kansas in the first instance without prior reference to the National Labor Relations Board and that said defendants' motion to dismiss on ground one that the Court is without jurisdiction of the subject matter should be overruled.

The Court further finds that Article 15, Section 12, of the Kansas Constitution known as the Right to Work Law

intended to prohibit only those agreements which condition employment upon membership or nonmembership in a labor union. That plaintiffs' right to employment is not abridged on account of membership or nonmembership in a union under the terms of the agency shop agreement and said agreement does not violate Article 15, Section 12, of the Kansas Constitution. That G.S. 1949, 44-803, does not prohibit the type of agreement involved in this case. That said defendants' motion to dismiss on ground two, that the petition does not state a cause of action should be sustained.

The Court further finds that additional argument should be had herein and sets said motion to dismiss for further argument on November 10, 1959, and on said date the parties appear by counsel as before.

Thereupon, the further agruments of counsel are fully heard by the Court and the matter is taken under advisement and the Court thereafter advises counsel that his order to be entered hereafter will be in accordance with his previous findings, but that the Court's ruling, order and judgment will be withheld and will not be effective until such date as an approved journal entry is submitted for the Court's signature.

And now on this 18th day of March, 1960, the Court enters its order herein as follows:

It is by the Court

Ordered, Adjudged and Decreed, That said defendants' motion to dismiss which is in substance a demurrer to plaintiffs' petition be, and the same is hereby, overruled as to ground one thereof for the reason that the Court has jurisdiction of the subject matter of this action; and it is further by the Court

Ordered, Adjudged and Decreed, That defendants' motion to dismiss be sustained as to ground two thereof for the reason that the petition herein fails to state a cause of

action in favor of plaintiffs and against these defendants, or either of them.

The notice of appeal, omitting caption, filed on March 29, 1960, is as follows:

NOTICE OF APPEAL

To the defendant, Cardinal Manufacturing Company, Inc., and Joseph H. McDowell, its attorney of record, and to defendant, General Drivers Allied Automotive and Petroleum Local Union No. 498, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and C. B. Butler, individually, and as President of said Local No. 498, and to Robert S. Fousek and James H. Barnes, their attorneys of record:

You, and each of you, are hereby notified that the plaintiffs, and each of them, intend to and do hereby appeal to the Supreme Court of the State of Kansas from the judgment, order and decision rendered by the District Court of Wyandotte County, Kansas, Division No. 3, on the 18th day of March, 1960, sustaining the motion to dismiss of the defendants, General Drivers Allied Automotive and petroleum Local Union No. 498 and C. B. Butler, for the reason that the petition herein fails to state a cause of action in favor of plaintiffs and against these defendants, or either of them, said motion to dismiss having been treated as a demurrer by counsel for all parties and by the Court.

Dated at Kansas City, Kansas, this 29th day of March, 1960.

LEONARD F. BANOWETZ,
and
STANLEY, SCHROEDER, WEEKS, THOMAS & LYSAUGHT,
By J. D. LYSAUGHT,
518 Brotherhood Building—DRexel 1-0448,
Kansas City 1, Kansas,
Attorneys for Plaintiffs.

Service of the foregoing notice of appeal and receipt of copy thereof are hereby acknowledged and proof of service by affidavit is hereby waived this 29th day of March, 1960.

/s/ JOSEPH H. McDOWELL,
Cardinal Manufacturing Company, Inc.,
Attorney for Defendant.

/s/ ROBERT FOUSEK,
/s/ JAMES H. BARNES,
Local Union No. 498 and C. B. Butler
Attorneys for Defendants.

CERTIFICATE

The foregoing is a true and correct abstract of the record.

J. E. SCHROEDER,
LEE E. WEEKS,
LEONARD O. THOMAS,
J. D. LYSAUGHT,
of Kansas City, Kansas,
LEONARD F. BANOWETZ,
of Wichita, Kansas,
JAY W. SCOVEL,
ROBERT K. SCOVEL,
of Independence, Kansas,
Attorneys for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 208

GENERAL DRIVERS ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION NO. 498, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, C. B. BUTLER, INDIVIDUALLY, AND AS PRESIDENT OF SAID LOCAL NO. 498, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL IN OPPOSITION.

J. E. SCHROEDER,
LEE E. WEEKS,
LEONARD O. THOMAS,
J. D. LYSAUGHT,
of Kansas City, Kansas,
LEONARD F. BANOWETZ,
of Wichita, Kansas,
JAY W. SCOVEL,
ROBERT K. SCOVEL,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 208.

GENERAL DRIVERS ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION NO. 498, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, C. B. BUTLER, INDIVIDUALLY, AND AS PRESIDENT OF SAID LOCAL NO. 498, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL IN OPPOSITION.

OPINION BELOW.

The opinion and decision of the court below (Appendix to the Petition, pp. 15-44) is officially reported at 188 Kan. 11, 360 P. 2d 456 (1961). The Memorandum Opinion and Journal Entry of the trial court (App. to the Pet., pp. 45-54) is unreported.

JURISDICTION.

The decree of the court below was entered on March 17, 1961, and a petition for rehearing was denied by that court on April 12, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (1952).

QUESTIONS PRESENTED.

1. Whether the controversy is moot because of the circumstances set forth in the statement of the case, paragraph D, p. 3 *infra*.

2. Whether jurisdiction of this Court has been properly invoked under 28 U. S. C. Sec. 1257.

3. Whether the decision of the Kansas Supreme Court sought to be reviewed decided a federal question of substance not heretofore determined by this Court, or decided such a question in a way probably not in accord with applicable decisions of this Court, within the meaning of Rule 19 (1)(a) of this Court.

STATEMENT OF THE CASE.

A. The Facts.

The statement of the facts leading to the filing of respondents' petition in the District Court of Wyandotte County, Kansas, as set forth in the petition (Pet., pp. 5-7) is accurate.

B. The District Court's Opinion and Decree.

In addition to the facts set forth in the petition (Pet., pp. 7-8), the motion to dismiss filed in the District Court by petitioners herein was treated by the parties and the trial court as a demurrer (Pet., pp. 16, 51).

C. The Kansas Supreme Court's Opinion and Decree.

The decision of the Kansas Supreme Court reversed the ruling of the lower court. Under Kansas law, this reversal of the order sustaining the demurrer had the same effect as overruling of the demurrer in the trial court. Contrary to the statement of facts in the petition (Pet., pp. 8-9) and as more fully set forth in the argument herein (*infra*, pp. 5-7), it was not necessary that a remand be included therein, and the Kansas Supreme Court decision did not amount to the granting of a motion for summary judgment or a declaratory judgment, but left the proceeding in the trial court awaiting the filing of subsequent pleadings or trial.

D. The Cessation of Operations of Cardinal Manufacturing Company, Inc.

The title of the case in the Kansas courts was "Higgins, et al. v. Cardinal Manufacturing Company, Inc., and General Drivers, Allied Automotive and Petroleum Local Union No. 498, IBT, et al., No. 42055, March 17, 1961" (Pet., p. 15). Cardinal Manufacturing Company, Inc. was the employer company which had contracted with the labor union here involved; plaintiffs were employees of Cardinal. Prior to the filing of the petition for writ of certiorari herein, Cardinal ceased operations and dissolved; all of its employees, including respondents here and other employees covered by the contract, which included the agency shop provisions the enforcement of which was restrained, had been terminated. That contract is not now applicable to any employees.

Respondents disclose the above facts which may raise a question as to whether the instant case is moot, but do not advocate dismissal of the petition for writ of certiorari on this ground.

ARGUMENT.

I. SINCE THE DECISION OF THE KANSAS SUPREME COURT IS NOT FINAL, THE JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED UNDER 28 U. S. C. SEC. 1257.

The decision of the Kansas Supreme Court sought to be reviewed is not a final judgment or decree within the meaning of 28 U. S. C. Sec. 1257. Therefore petitioners' attempt to invoke the jurisdiction of this Court under that section (Pet., p. 2) is improper.

The case arises on a petition by respondents to enjoin application of a contract provision and to secure a declaratory judgment. In accordance with Kansas practice, Kan. Gen. Stat. Ann. Sec. 60-705 (1949), p. 13 *infra*, the motion to dismiss filed by petitioners herein was treated by the parties and the trial court as equivalent to a demurrer since it challenged only the sufficiency of the petition to state a cause of action and the jurisdiction of the court as to the subject matter (Pet., pp. 16, 51). The trial court entered an order (Pet., pp. 51-4) sustaining petitioners' motion to dismiss, hereinafter referred to as petitioners' demurrer. On appeal to the Supreme Court of the State of Kansas, the order sustaining the demurrer was reversed.

For a decision of a state appellate court to be final within the meaning of 28 U. S. C. Sec. 1257, it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. See *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

Applying its general rule that the overruling of a de-

murrer is not a final judgment for the purpose of Supreme Court review, this Court has ruled that a decision of the Kansas Supreme Court sustaining a demurrer in a civil suit, where the trial court had not dismissed the suit, lacked the finality requisite to sustain a writ of error. The basis for this decision—that the cause was left standing for such proceedings as might be had by amendment to the petition or entry of final judgment—is equally applicable here. *Missouri & Kansas Interurban Ry.* v *City of Olathe*, 222 U. S. 185 (1911). If a judgment sustaining a demurrer is not a final order, *a fortiori* an order denying a demurrer is not final.

Moreover, under established Kansas law a ruling on a demurrer is not a final judgment. Petitioners, the demurrants, not only may plead defenses other than those set forth in their demurrer but also are free to raise by way of defense the same matters considered on demurrer. See Kan. Gen. Stat. Ann. Secs. 60-707, 60-758 (1949), p. 13 *infra*; *Shields* v. *State Highway Comm'n*, 178 Kan. 342, 286 P.2d 173 (1955); *Miller* v. *Whistler*, 153 Kan. 329, 110 P.2d 744 (1941). Thus the order in this case is not a final determination of the rights of the parties and does not conform to the standards required for a final judgment under the applicable Kansas statute. See Kan. Gen. Stat. Ann. Sec. 60-3101 (1949), p. 13 *infra*.

The fact that Kansas law specifically makes a ruling on a demurrer appealable does not import finality. Kan. Gen. Stat. Ann. Sec. 60-3302 (1949), p. 14 *infra*. The reversal of the ruling of the trial court on petitioners' demurrer produced only the same effect as if the trial court had overruled the demurrer and directed the defendants to file an answer. In *Waddell* v. *Woods*, 160 Kan. 481, 483-84, 163 P.2d 348, 350 (1945), the court stated:

> "• • • When this court, upon appeal, merely reverses a district court on its ruling in connection with a de-

> murrer to a pleading and no judgment is directed in behalf of either party, the effect of the ruling by this court is the same for the purpose of further proceedings in the district court as if the district court had made the same ruling without an appeal to this court. Under such circumstances the district court is not divested of any discretion it may have in connection with the filing of subsequent pleadings and is not precluded from exercising further jurisdiction in the pending case. In such instance the doctrine of *res judicata* does not rise to any greater height or expand to any greater extent by reason of the ruling having been made by this court rather than originally made in the district court. * * *"

Petitioners' contention (Pet., p. 8) that the decision of the Kansas Supreme Court amounts either to the granting of a motion for summary judgment in plaintiffs' favor, or a declaratory judgment that the agency shop agreement in the instant case was invalid, is inaccurate and not supported by the authorities cited. *The Gas Service Co.* v. *The Consol. Gas Utilities Corp.*, 150 Kan. 715, 96 P.2d 608 (1939), held that an appeal may not be taken from an order overruling a motion for judgment on the pleadings where a demurrer which raised the same question of law had previously been overruled and no appeal had been perfected in time. *Kotwitz* v. *Gridley Motor Company*, 148 Kan. 676, 84 P.2d 903 (1938), involved a demurrer to the evidence interposed by the defendant at the conclusion of the plaintiff's evidence in a jury trial. The demurrer was overruled and, when the jury could not agree on a verdict, the defendant filed a motion for rehearing on the demurrer to the evidence and for a directed verdict. Both motions were denied by the trial court. Subsequently the action was dismissed without prejudice on plaintiff's motion and, when the defendant appealed from the order overruling the demurrer to the evidence, it was held that his right to appeal could not be cut off by the plaintiff's securing a dismissal of the action without prejudice. *The*

Union Pacific Ry. v. *Estes*, 37 Kan. 229, 15 Pac. 157 (1887), held merely that if, after an adverse ruling on a demurrer to a petition, the defendant files an answer, he must await the result of the trial before appealing the ruling on the demurrer. None of the cases cited by petitioners holds that a ruling on a demurrer is a final judgment as necessary for invocation of this Court's jurisdiction.

Furthermore, in its present posture the instant litigation involves only a temporary restraining order. By granting petitioners' motion to dismiss, the trial court merely vacated this temporary order. The Kansas Supreme Court reversed the trial court action. A state court order granting a preliminary, temporary, or interlocutory injunction is not a final judgment for purposes of review under 28 U. S. C. Sec. 1257. See *Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178 (1952), dismissing as improvidently granted a writ of certiorari to review affirmance of a temporary injunction.

II. THE DECISION OF THE SUPREME COURT OF KANSAS SOUGHT TO BE REVIEWED NEITHER DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, NOR DECIDED SUCH A QUESTION IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, WITHIN THE MEANING OF RULE 19, PARAGRAPH 1(a) OF THIS COURT.

Petitioners' argument, variously phrased, is that the National Labor Relations Act (the "Act") precludes a state from prohibiting enforcement of the "agency shop" type of union security clause, the application of which was temporarily restrained in this case. Petitioner charges that the judgment of the Kansas Supreme Court decided a federal question of substance not heretofore determined by this Court and in a way probably not in accord with the appli-

cable decisions of this Court. Neither charge is correct. The substantive issue involved was presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.*, 336 U. S. 301 (1949).

Algoma Plywood ruled that union security arrangements were not protected by the Act and that the states were therefore free to prohibit or restrict such arrangements. Since the operative facts in *Algoma Plywood* occurred prior to the 1947 Taft Hartley amendment to the Act which introduced Section 14(b), the decision was that neither Section 7 nor Section 8(a)(3) of the Act, on which petitioners here rely, in any way limited the right of a state to restrict or to prohibit any form of union security. In rejecting the precise argument set forth in the petition the Court stated (336 U.S. at 307):

> "It is argued, therefore, that a State cannot forbid what § 8(3) affirmatively permits. The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. . . ."

The Court viewed Section 14(b), added in 1947 by the Taft Hartley amendment, as confirming the rights of the states to impose restrictions on union security arrangements beyond those set forth in the Act. The opinion states (336 U. S. at 313-14):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive. . . ."

The dissenting opinion in *Algoma Plywood* expressly recognized that even assuming the correctness of the pre-1947 administrative interpretation of Section 8(3) of the Act (rejected by the majority of seven justices but here pressed by petitioners), the addition of Section 14(b) by the 1947 Taft Hartley amendment removed any question as to the validity of state restrictions on union security arrangements, stating (336 U. S. at 325):

> ". . .The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. 61 Stat. 136, 151, 29 U. S. C. § 164. And the National Labor Relations Board has now construed the new federal Act as precluding such contracts to the same extent that they are precluded by state law. . . ."

Subsequent decisions of this Court citing and approving *Algoma Plywood* make clear that the states are free to prohibit or restrict union security arrangements. See, *e.g.*, *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 477 (1955); and *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1, 10 (1957). In the *Weber* case, the ruling in *Algoma Plywood* was summarized (348 U. S. at 477):

> "The Court allowed a State to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U. S. 301. Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State."

Both the rationale and the express language of *Algoma Plywood* make clear its holding decided that the Act in no way restricts the rights of the states to prohibit or restrict union security arrangements. See *supra*, p. 8. The maintenance of membership clause there involved and the agency shop provision considered in the instant case are

both types of such arrangements. Consequently the question of federal law petitioners characterize as novel has already been decided and the decision of the Kansas Supreme Court does not conflict with, but accords with that decision.

Only brief mention need be made of the subsidiary arguments advanced in the petition.

One is that leaving to the states the right to impose additional restrictions upon union security arrangements will result in a "crazy quilt and chaotic pattern" of bargaining and dissipate rights protected by Section 7 of the National Labor Relations Act (Pet., pp. 11-12). The short answer is that this Court and the many other tribunals which have considered this question over the past decade have ruled that this is precisely what Congress intended with respect to the area of union security arrangements.

Another is that the decision of the Kansas Supreme Court —and therefore *Algoma Plywood*—conflicts with recent decisions of this Court (Pet., pp. 9, 11, 12). But none of these decisions deals with the matter of union security arrangements here involved,* and none suggests any limitation upon the rights of the states to prohibit or regulate such arrangements or in any way impairs the authority of *Algoma Plywood*. Indeed, petitioners' repeated reliance upon *Hill* v. *Florida*, 325 U. S. 538 (1945), which antedated and was distinguished in *Algoma Plywood*, establishes that petitioners are again advancing the same arguments there made and rejected.

A third is that the "agency shop" arrangement here involved does not "require union membership as a condition of employment," and hence regulation of "agency shop" arrangements is not permitted by Sections 8(a)(3) and 14

* *Hill* v. *Florida*, 325 U. S. 538 (1945), concerned a state statute requiring licensing of business agents. *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953), and *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959), involved respectively an injunction against and damages assessed for picketing.

(b) of the National Labor Relations Act (Pet., p. 13). There are two complete answers. First, *Algoma Plywood* made clear that even prior to the introduction of Section 14(b) in 1947, the states were free to regulate all types of union security arrangements, one form of which is the "agency shop." Second, the opinions in *Algoma Plywood* above quoted and the rule of the National Labor Relations Board establish that Section 14(b) must, in view of its legislative history, be given a broad construction. In *Giant Food Shopping Center, Inc.*, 77 N. L. R. B. 791 (1948), decided prior to *Algoma Plywood*, the Board stated, *id.* at 793:

> "Section 14(b), therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce."

Finally, Petitioners contend that the Act ousts state courts of jurisdiction to prohibit enforcement of union security arrangements on the ground that the National Labor Relations Board "has taken the issue * * * in hand" (Pet., p. 13). But the obvious design of the Act is (a) to prohibit certain types of union security arrangements, a prohibition which the Board properly enforces; and (b) to permit the states to impose and enforce additional restrictions on union security arrangements if they so desire. The fact that the National Labor Relations Board acts within its jurisdiction to consider whether certain union security arrangements meet the standards prescribed by the Act—*i.e.*, are not prohibited thereby—is irrelvant to the issue. That issue is whether a state may impose additional limitations on union security arrangements; that it may do so and that the judgment of the Kansas Supreme Court accords with the Act and the decisions of this Court thereunder has been previously demonstrated. Petitioners' argument as to

"ousting jurisdiction" is a repetition of a contention made to this Court in *Algoma Plywood* and there rejected. See 336 U. S. at 314-15.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Pertinent statutes, in addition to those set forth in the petition (pp. 3-4) are as follows:

Kan. Gen. Stat. Ann. Sec. 60-705 (1949)

> "The defendant may demur to the petition only when it appears on its face, either: *First*, that the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second*, that the plaintiff has no legal capacity to sue. *Third*, that there is another action pending between the same parties for the same cause. *Fourth*, that several causes of action are improperly joined. *Fifth*, that the petition does not state facts sufficient to constitute a cause of action."

Kan. Gen. Stat. Ann. Sec. 60-707 (1949)

> "When any of the defects enumerated in section 93 [60-705] do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

Kan. Gen. Stat. Ann. Sec. 60-758 (1949)

> "Upon a demurrer or motion being overruled, the party who demurred may answer or reply, if the court or judge be satisfied that he has a meritorious claim or defense, and did not demur or make such motion for delay."

Kan. Gen. Stat. Ann. Sec. 60-3101 (1949)

> "A judgment is the final determination of the rights of the parties in an action."

Kan. Gen. Stat. Ann. Sec. 60-3302 (1949)

"The supreme court may reverse, vacate or modify any of the following orders of the district court or a judge thereof, or of any other court of record except a probate court. *First*—A final order. *Second*—An order that discharges, vacates or modifies a provisional remedy; or that grants, refuses, vacates or modifies an injunction; . . . *Third*—An order that involves the merits of an action, or some part thereof. *Fourth*—. . . ."

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I.

The respondents have suggested, but have not urged, that this case may be moot because the employer party to the collective agreement containing the agency shop clause herein has gone out of business. This fortuity no more terminates the litigable rights of the parties to this case than would the termination of the collective agreement itself—another happenstance which often occurs in litigation involving particular clauses whose enforcement or operation have raised issues of sufficient moment to bring before

this Court. See e.g. *Textile Workers v. Lincoln Mills,* 353 US 448 at 449. Furthermore, there is a continuing possibility in the instant case of cross or counter claims for damages, as for payment of undeducted service fees during, at the very least, the period of the temporary restraint against such deductions entered herein when the employer was in business, and as for recovery of litigation expenses, including attorneys' fees, in the event of reversal here. See *Springfield v. Crawfordsville State Bank,* 231 US 541, 542.

II.

Respondents more seriously raise the objection that there is no final judgment here, the rights of the parties not being fully determined by the mere reversal by the Kansas Supreme Court of the trial court's ruling that the complaint did not state a cause of action. It is significant, however, that the court below did not remand the case for trial or other further proceedings, this for the reason, as understood and regarded by the parties, that the suit was one for declaratory judgment, not injunction alone. The issue of the validity of the agency shop clause having been thoroughly briefed and argued, and the Kansas Supreme Court having discussed and disposed of this issue in favor of the contentions of the respondents, surely no purpose whatsoever would or could be served by further litigation below. It is not argued nor is it the fact that the parties contemplate further litigation on the merits; the full declaration of the rights by the highest tribunal in the state has served the basic purpose of the original action. If substance not form is to control, the issues presented in this petition are ripe for adjudication here, for surely the decision of the court below for all practical and legal purposes has determined the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of en-

tering a judgment for petitioners. Thus the requirements of *Gospel Army v. Los Angeles*, 331 US 543, have been fulfilled. The factor which distinguishes the present case from *Missouri and Kansas Interurban Ry. v. City of Olathe*, 222 US 185 (1911) and other cases cited by respondents is that here, unlike in those cases, the principle relief sought was a declaration of rights (regarding the validity and enforceability of the agency shop clause), and that relief has been fully accorded by the highest state tribunal, leaving nothing to be done below by way of litigation or adjudication except the ministerial act of entering a declaratory judgment in plaintiffs' favor.

III.

On the merits, respondents place almost entire reliance on this Court's decision in *Algoma Plywood v. The Wisconsin Employment Relations Board*, 336 US 301, and the assumption that that case equates a union security agreement involving some aspect of union membership as a condition of employment. The language of the decision permits no such assumption. To begin with the case itself involved a maintenance of membership clause and not an agency shop clause, and at the time the decision was written (1949) the agency shop clause was a relatively obscure subject matter of collective bargaining. It cannot be assumed that the agency shop clause, because it may operate to encourage union membership, is in fact a type of agreement outlawed by Section 8(a)(3) of the Act, any more than it can be assumed that an exclusive union referral or hiring hall agreement, because it may encourage union membership, constitutes a type of agreement proscribed by that section. See e.g. Local 357, *International Brotherhood of Teamsters v. N.L.R.B.*, 365 US 667. Nor is there any charge or showing here that the amount of the service fee did not repre-

sent a fair proportion of the costs of collective bargaining to be borne by all who receive the benefits thereof. The considerations which might impel the banning of agreements which compel union membership, including the factor of alleged forced membership in and allegiance to an organization to which an employee might have social, political or religious objections, are not applicable to the question of whether employees should obtain statutory protection from any attempt by a collective bargaining representative to obtain from them the aliquot costs of obtaining and administering a collective agreement.

Since the legislative history of the Act discloses no intent on the part of Congress to impose or permit restrictions in the field of agency shop agreements, and since the considerations applicable to their use are different from the considerations applicable to the use of agreements which in one way or another require actual union membership as a condition of employment, respondents are not justified in attempting to extend either the language or rationale of *Algoma Plywood* to embrace a type of agreement in no way involved in that case. Indeed, since the Court (336 US at 315) spoke synonymously only of union security agreements requiring membership as a condition of employment, it is only that type of agreement, and not the agency shop agreement, which can be considered as embraced under the term "union security agreement" as that term is used in the decision.

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